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No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, AND THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

– against –

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF UNITED CEREBRAL PALSY ASSOCIATIONS, INC. and UNITED CEREBRAL PALSY OF NEW YORK CITY, INC., *AMICI CURIAE*

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BRIEF OF UNITED CEREBRAL PALSY ASSOCIATIONS, INC. and UNITED CEREBRAL PALSY OF NEW YORK CITY, INC., *AMICI CURIAE*

INTEREST OF AMICI CURIAE*

United Cerebral Palsy is a nationwide network of approximately 250 state and local voluntary agencies (UCP affiliates) which provides services, conducts public and professional education and advocacy programs, and supports research about cerebral palsy. The United Cerebral Palsy Associations, Inc.

* Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

("UCPA") is the national organization, formed in 1949, to coordinate and assist the affiliates and their over one and a half million volunteers in carrying out these programs.

At the local level, UCP affiliates provide direct services to children and adults with cerebral palsy and their families, including when necessary, special education and related services. On the national level, UCPA serves in an advocacy role for the handicapped in governmental activities, encouraging legislation and federal, state and local programs to benefit those with cerebral palsy and other disabilities.

The express mission of UCP is to involve individuals with cerebral palsy and their families and those with similar service needs in the mainstream of society by assuring their ability to assume their rights as citizens and to receive services as needed. The assurance of an "appropriate education" as contemplated in the Education For All Handicapped Children Act, 20 U.S.C. §§1401 *et seq.* (the "Act"), is an integral part of that mission.

UCP of New York City, Inc. ("UCP/NYC") is the largest UCP affiliate in the State of New York, and has had substantial experience in dealing with the implementation of "appropriate education" under the Act, and in relation to New York State statutes and regulations. UCP/NYC is plaintiff in a major class action litigation involving the provision of appropriate education to approximately 90,000 handicapped students suffering from cerebral palsy and a wide spectrum of other disabilities. *United Cerebral Palsy* v. *Board of Education*, 3 Education of the Handicapped Law Reporter ("E.H.L.R.") 551: 251 (E.D.N.Y. 1979), *aff'd sub nom. Jose P.* v. *Ambach*, F. 2d (2d Cir. January 21, 1982). As such, UCP/NYC both has a direct, immediate interest in the standards for "appropriate education" under the Act at issue in this case, and is in a position to bring to the Court information on its implementation which may not be available from other sources.

STATEMENT

UCPA and UCP/NYC believe that the holding of the Courts below, declaring that Amy Rowley was entitled to the services of

a sign language interpreter as a part of her educational program in the petitioner school district, should be affirmed. In support of this position, UCPA and UCP/NYC join in those parts of the brief of *amici curiae Association for Retarded Citizens of the United States, et al.* that discuss the findings of fact below and that set forth a full analysis of the requirements of the Act and the obligations of the state and local school district in accepting funds thereunder.

UCPA and UCP/NYC respectfully disagree, however, with *amici Association for Retarded Citizens of The United States, et al.* insofar as they suggest that the standard of "appropriate education" that was expressly relied upon by the lower courts "is not a proper across-the-board standard under the Act." This brief is submitted to present the legal basis for UCP's separate views on this critical issue.

SUMMARY OF ARGUMENT

The definition of appropriate education set forth in §1401(18) of the Act incorporates state educational policies and federal substantive and procedural requirements. The federal courts which have been called upon to apply these general criteria to the particular needs of individual handicapped children have articulated and/or applied three specific standards for determining appropriate education: "maximum potential," "commensurate opportunity" and "self-sufficiency."

The "maximum potential" standard, though perhaps desirable in the abstract, could require such enormous expenditures that it cannot realistically be considered consistent with Congressional intent. The "self-sufficiency" standard is inadequate because it relates only to the needs of a limited number of severely disabled children, and provides no guidance whatsoever for the needs of the overwhelming majority of handicapped students covered by the Act, whose needs go beyond self-sufficiency.

The "commensurate opportunity" standard adopted by the courts below is the only one of the proferred approaches which is

consistent with the purposes of the Act and its legislative history. All of the federal Courts of Appeals and most of the District Courts which have considered these issues have adopted this standard or cited it with approval. Consideration of both the actual case law experience to date and implementation issues arising under the Act which might require judicial review in the future, show that the commensurate opportunity standard both assures reasonable fiscal prudence and is judicially manageable.

ARGUMENT

THE "COMMENSURATE OPPORTUNITY" STANDARD FOR DEFINING "APPROPRIATE EDUCATION," ADOPTED BY THE COURTS BELOW, IS THE ONLY STANDARD WHICH IS CONSISTENT WITH THE PURPOSES OF THE ACT AND ITS LEGISLATIVE HISTORY AND RELATES TO THE NEEDS OF ALL HANDICAPPED CHILDREN.

The key requirement of the Education of the Handicapped Act, 20 U.S.C. §1401 *et seq.*, as amended by the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, ("the Act") is that each state and local educational agency receiving federal grants thereunder, assure each handicapped child in the jurisdiction a "free appropriate public education." 20 U.S.C.§§1412(1), 1414(a)(1). Free appropriate public education ("FAPE") is specifically defined in 20 U.S.C. §1401(18) as follows:

> (18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate pre-school, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414 (a) (5) of this title.

See also 34 C.F.R. §300.4.

Except for the obligation to provide services "at public expense" (in contrast to prior practice in some states of requiring parents to pay some or all of the costs of educating their children in expensive private schools· *see, e.g., McMillan* v. *Board of Education*, 430 F. 2d 1145 (2d Cir. 1970); *Elliot* v. *Board of Education*, 64 Ill. App. 3d 229, 380 N.E.2d 1137 (1978)), this broad definition is not self-referent. Rather, it provides a comprehensive framework that draws upon a variety of criteria to combine substantive requirements and flexible particularity to cover the individual needs of millions of children suffering from hundreds of kinds of disabilities. Thus, §1401 (18) specifically incorporates by reference the minimum educational standards of the applicable state law and regulations,* uniform federal substantive requirements contained in the definitions of "special education," and "related services," and specific federal procedures for formulation of the "individualized education program."** The resulting combination of state educational policies, federal substantive standards, and individualized federal planning procedures, should in each case provide education fully "appropriate" to each child's needs.

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* The "standards of the state educational agency" to which §1401 (18)(B) refers would include both minimum standards applicable to regular public school programs in the state (such as teacher certification requirements) and, in addition, specific standards applicable to the needs of the handicapped which some states have enacted in accordance with local policies and educational approaches. (*See, e.g.,* New York State's regulations providing specific maximum class size and age range limitations for each major disability category. 8 N.Y.C.R.R. §200-1.4.)

** The federal definition of "special education" in §1401 (16), incorporated by reference in the definition of FAPE, provides substantive benchmarks requiring state and local education agencies to provide "specially designed instruction ... to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." The additional requirement for the provision of "related services" in §1401 (17) details further explicit substantive requirements for particular services "including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services...."

The reference in §1401(18) to conformity with the "individualized education program," incorporates by reference into FAPE the entire process of formulating an individualized education plan each year designed to respond to the child's particular needs (§1414(a)(5)), and also, by necessary implication, the

Because of the detailed substantive and procedural requirements of the Act, most disputes concerning the appropriateness of a particular child's education are resolved at local school district conferences, or in state level administrative hearings. Where resort to the courts has been necessary, judges have often been able to resolve disputes by applying express provisions of the Act, especially those specifying individualized planning and due process procedures. *See, e.g. Battle* v. *Pennsylvania*, 629 F. 2d 269 (3d Cir. 1980), *cert. denied sub nom. Scanlon* v. *Battle*, 101 S.Ct. 3123 (1981) (blanket policy limiting instructional year to 180 days held inconsistent with individualized process requirements of the Act), *Concerned Parents and Citizens For Continuing Education at Malcolm X* v. *New York City Board of Education*, 629 F. 2d 751 (2d Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981) (transfer of child from one site location to another is not a change in educational placement triggering due process requirements under the Act). At times, however, courts have been presented with issues which require them to render substantive decisions concerning the appropriateness under the Act of the education being offered in particular fact situations.

This kind of judicial scrutiny clearly was contemplated by Congress. Section 1415(e)(2) of the Act creates a private right of action in the federal district courts for any party aggrieved by the result of the state administrative proceedings, regardless of the amount in controversy. Departing from the usual "substantial evidence" standard for judicial review of administrative action

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testing and evaluation that must precede the design of a proper plan (§1412(5)C)) and the administrative hearings and other due process guarantees which may follow (§1415).

The highly limited interpretation of its responsibilities under the Act put forward here by petitioner New York State Education Department ("the content of that education is left to the states" Pet. 33) is inconsistent, on its face, with the definition of free appropriate public education in §1401 (18) which specifically adds to its reference to local state standards, additional substantive federal requirements for "free education," "special education," "related services," and individually designed education. Petitioner's further suggestion (Pet. 62-3) that "appropriate education in the Act refers only to "mainstreaming" requirements for placement in the "appropriate," least restrictive environment, further ignores the comprehensive, substantive definition of FAPE set forth in §1401(18).

(*see, e.g.*, Administrative Procedure Act, 5 U.S.C. §706(2)), §1415(e)(2) directs the federal district court to "hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, ... grant such relief as the court determines is appropriate."*

In this reviewing capacity the district courts have, of necessity, tended to develop judicial standards for evaluating the facts of individual cases in light of the statutory language, Congressional intent and well-considered holdings in analogous cases. *Cf.* Note, "Enforcing the Rights to an Appropriate Education: The Education for All Handicapped Children Act of 1975," 92 Harv. L. Rev. 1103, 1125 (1979).

In the five years that the Act has been in effect, only three such standards have been articulated and applied in decisions of the federal courts.** These three standards may be summarized as follows:

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* Consistent with the indication in the conference committee report, that the court in these cases "shall make an *independent decision based on a preponderance of the evidence*..." S. Conf. Rep. No. 455, 94th Cong., 1st Sess. at 50 (1975), *reprinted in* [1975] U.S. Code Cong. & Ad. News 1480, 1503 (emphasis added), the courts have uniformly interpreted §1415 to call for independent, *de novo* judicial review. *Anderson* v. *Thompson*, 495 F. Supp. 1256, 1260-61 (E.D. Wis. 1980), *aff'd*, F. 2d, 3 E.H.L.R. 553:105 (7th Cir. 1981); *Town of Burlington* v. *Dept. of Education*, 655 F. 2d 428 (1st Cir. 1981); *Tokarcik* v. *Forest Hills School District*, F. 2d, 3 E.H.L.R. 552:513, 521 (3d Cir. 1981); *Kruelle* v. *New Castle County School District*, 642 F. 2d 687, 692 (3d Cir. 1981); *Ladson* v. *Board of Education*, 3 E.H.L.R. 551:188, 189 (D.D.C. 1979).

** A fourth standard, one calling simply for "opening the doors of the regular classroom to those capable of entering and learning without special assistance" Note, 92 Harv. L. Rev. at 1125, which might be called a "minimum adequacy" standard or an equal "access" theory (Brief of *Amici Curiae* National School Boards Association, *et al.*, 8) is also conceivable.

No judge has advocated and no court has applied such a minimum adequacy standard, however, because it is obviously inconsistent with the explicit purposes of the Act to assure that handicapped children receive a "full educational opportunity" 20 U.S.C. §1401 (16). The "adequate education" standard mentioned and rejected out of hand by Judge Broderick in the District Court below would appear to fit into this category. *See* 483 F. Supp. at 534.

1. *Maximum potential.* "An appropriate education... mean[s] one which enables the handicapped child to achieve his or her full potential."

2. *Commensurate opportunity.* Appropriate education requires that "each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children."

3. *Self-sufficiency.* An appropriate education means "an education for each handicapped child that enables the child to be as free as reasonably possible from dependency on others, and would enable the child to become a productive member of society."

Each of these standards was considered by the courts below. Judge Broderick explicitly rejected the "maximum potential" standard, and specifically adopted the "commensurate opportunity standard", as defined above. 483 F. Supp. at 534. His approach was affirmed by the majority of the panel in the Second Circuit. However, Judge Mansfield, dissenting from the Second Circuit opinion, advocated the "self-sufficiency" standard, as defined above.* 632 F. 2d at 953 (as apparently do the petitioners in this case (Pet. 66)).

Amici curiae respectfully submit that the Court should affirm Judge Broderick's commensurate opportunity standard because, quite simply, it is the only one of the proferred approaches which is consistent with the purposes of the Act** and its legislative history, and is capable of general application. The maximum potential standard, though perhaps desirable in the abstract,

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* The self-sufficiency standard as defined by Judge Mansfield included an additional clause stating that an appropriate education also would "hopefully promote academic achievement by the child that would roughly approximate that of his or her nonhandicapped classmates." 632 F.2d at 953. The meaning of this clause in its context is difficult to comprehend. It seems more relevant to Judge Broderick's commensurate opportunity standard than to Judge Mansfield's attempt to define a standard consistent with his view that "[t]he aim of the Act is to develop a handicapped child's self-sufficiency" 632 F. 2d at 952.

** This standard would also appear to be consistent with, if not explicitly required by, the specific language of §1401(18)(C). That provision, in partially defining "appropriate education" in terms of "an appropriate pre-school, elementary, or secondary school education in the State involved" utilizes regular public school education as provided in the particular State as a comparative benchmark for evaluating the propriety of education for the handicapped.

could require such enormous expenditures if widely implemented that it cannot realistically be considered consistent with Congress's intent. The self-sufficiency standard is inadequate because it relates only to the needs of a limited number of disabled children, and provides no guidance whatsoever for the needs of the overwhelming majority of the handicapped students covered by the Act, whose needs go beyond self-sufficiency.

Significantly, not only the Second Circuit, but also the Third, and Eighth Circuits (which constitute all of the federal Courts of Appeals that have considered this question), as well as the overwhelming majority of the district courts – in cases holding for and against plaintiffs – have adopted or cited with approval, the commensurate opportunity standard. *See Springdale School District* v. *Grace,* 656 F. 2d 300, 305 (8th Cir. 1981) ("The *Rowley* standard provides the handicapped child with the opportunity to achieve her full potential but takes into account that such a task is equally fair and feasible only to the extent that such opportunity must be commensurate with the opportunity granted to nonhandicapped in the same system."; *Battle* v. *Pennsylvania,* 629 F. 2d at 277 ("Thus, the Act probably anticipates that, where possible, educational objectives for the handicapped should be set with reference to those objectives established for the nonhandicapped." (*Gladys J.* v. *Pearland Independent School District,* 520 F. Supp, 869, 875 (S.D. Tex. 1981); *Espino* v. *Besteiro,* 520 F. Supp. 905, 912-913 (S.D. Tex. 1981); *Pinkerton* v. *Moye,* 509 F. Supp. 107, 113 (W.D. Va. 1981); *Bales* v. *Clarke,* 523 F. Supp. 1366, 1370 (E.D. Va. 1981); *Hines* v. *Pitt County Board of Education,* 497 F. Supp. 403, 406 (E.D.N.C.1980).

Two district courts have adopted or referred to the maximum potential standard. *Age* v. *Bullitt County Public Schools,* 3 E.H.L.R. 551:505, 506 (W.D. Ky. 1980) ("The Court is persuaded that the intent of the Act is to furnish the optimum in the way of education to those to whom nature has dealt less than a full hand"); *DeWalt* v. *Burkholder,* 3 E.H.L.R. 551:550, 553 (E.D. Va. 1980) ("The Hampton Schools offer Christine the best hope for the future... [and] the most appropriate education.") Most judges, however, have rejected the maximum potential approach in favor of the commensurate opportunity standard largely because of considerations of fiscal prudence:

> An appropriate education is not synonymous with the best possible education. *Springdale School District* v. *Grace,* 494 F. Supp. 266, 272 (W.D. Ark. 1980). It is also not an education which enables a child to achieve his full potential: "even the best public schools lack the resources to enable every child to achieve his full potential." *Rowley* v. *Board of Education,* 483 F. Supp. 528, 534 (S.D.N.Y. 1980). Plaintiff's parents are seeking an ideal education for their child. Their aspirations are understandable, even admirable. But neither they, nor any other parents have the right under the law to write a prescription for an ideal education for their child and to have the prescription filled at public expense.

Bales v. *Clarke,* 523 F. Supp at 1370. *See also Pinkerton* v. *Moye,* 509 F. Supp at 113; *Rettig* v. *Kent City School District,* 3 E.H.L.R. 552:503 (N.D. Ohio 1981).

A number of courts have referred to "self-sufficiency" but no court has advocated it as a general standard because all appear to have recognized the critical fact, overlooked by Judge Mansfield in his dissent below, that self-sufficiency as a goal does not relate to all categories of handicapping conditions covered by the Act. Thus, in cases involving extremely low-functioning students such as the severely retarded student in *Campbell* v. *Talladega County Board of Education,* 518 F. Supp. 47 (N.D. Ala. 1981) and the multiply handicapped child in *Gladys J.* v. *Pearland, supra,* the courts have found it helpful to consider the self-sufficiency goal, but they specifically noted that self-sufficiency is a partial standard applicable only to some of the students covered by the Act.* *Campbell,* 518 F. Supp. at 54, *Gladys J.,* 523 F. Supp at 875.

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* Actually, "self-sufficiency" is not a valid general standard even for the severely disabled because for many very low-functioning children, self-sufficiency is not a realistic, attainable goal. Brown, *et al.,* "The Principle of Partial Participation and Individualized Adaptations in Educational Programs for Severely Handicapped Students," in 10 Curricula Strategies for Teaching Severely Handicapped Students Functional Skills in School and Non-School Environments (D. Baumgart, *et al.,* eds. 1980) Brown, *et al.,* "A Strategy for

Judge Mansfield's assumption that Congress's *exclusive* concern was to promote self-sufficiency for handicapped children, an assumption which has been adopted and urged by the petitioners herein (Pet. 66) simply is incorrect. Of course, Congress recognized the needs of many of the severely disabled to strive for self-sufficiency. But its primary purpose was to provide a statutory scheme firmly grounded in broad concepts of equal educational opportunity that would confer benefits on all categories of disabled children. The Third Circuit, analyzing in detail the legislative history on this point, concluded:

> The Education Act embodies a strong federal policy to provide an appropriate education for every handicapped child. Three interrelated purposes underlay its passage. First, Congress sought to secure by legislation the right to a publicly-supported equal educational opportunity which it perceived to be mandated by *Brown* v. *Board of Education,* and explicitly guaranteed with respect to the handicapped by two seminal federal cases, *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania* and *Mills* v. *Board of Education.* Second, Congress intended the provision of education services to increase the personal independence and enhance the productive capacities of handicapped citizens. Third, Congress acknowledged the need for an expanded federal fiscal role to aid state compliance with the court decisions and to assure protection for the rights of handicapped children.

Kruelle v. *New Castle County School District,* 642 F. 2d at 690–691. (footnotes omitted and emphasis added). *See also Battle* v. *Pennsylvania,* 629 F. 2d at 278–79.

Developing Chronological Age Appropriate and Functional Curricular Content for Severely Handicapped Adolescents and Young Adults," 13 J. Special Educ. 81 (1979); Sontag, Smith & Sailor, "The Severely/Profoundly Handicapped: Who Are They? Where Are We?" 1977 J. Special Educ. 5. To generalize an unattainable goal as a legal standard would tend to certify the failure of any child who could not achieve this goal. It also could prove even more fiscally imprudent than the maximum potential standard, if local school districts were to consider themselves mandated to do everything conceivably possible, at inordinate cost, to pursue unlikely possibilities for "self-sufficiency."

The Senate Committee Report specifically stated a "belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity." S. Rep. No. 168, 94th Cong., 1st Sess. 9 (1975), *reprinted in* [1975] U.S. Code Cong. & Ad. News 1425, 1433 ("the Senate Report"). The theme of extending to the handicapped the equal educational opportunity rights of *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954), articulated in regard to the handicapped in the landmark cases of *Pennsylvania Association for Retarded Children* v. *Pennsylvania,* 334 F. Supp. 1257 (E.D. Pa. 1971), *modified,* 343 F. Supp. 279 (1972), and *Mills* v. *Board of Education,* 348 F. Supp. 866 (D.D.C. 1972) is repeated throughout the Senate Report, *id.* at 6, 9, 17; H.R. Rep. No. 332, 94th Cong., 1st Sess. 3 (1975), ("the House Report"); and in the debates, *see, e.g.,* 121 Cong. Rec. 19485 (1975) (remarks of Sen. Williams); *id.* at 19504, (remarks of Sen. Schweiker); *id.* at 37410 (remarks of Sen. Randolph). This goal to "assure equal protection of the law" for handicapped children was specifically incorporated in the statutory statement of purpose adopted with the Act, Pub. L. No. 94-142, §3 (a), 89 Stat. 775 (1975).

The Congressional insistence on providing a "full educational opportunity to *all* handicapped children" 20 U.S.C. §1412(2)(A)(i) (emphasis added) reflected a Congressional concern with the complex, variegated needs of all the handicapped, which go well beyond "self-sufficiency." Representative Quie specifically articulated this understanding in the House debate:

> [A]ll handicapped children are not the same. Children often have unique problems. Not all blind children need the same special program; many can be educated in regular classrooms with some assistance from readers and special braille textbooks; others are trained in special segregated classrooms or institutions.... Also it is difficult to make a judgment simply on the basis of the word 'handicapped' because a deaf child may require far more services, specialized personnel, training, and equipment than a retarded child. A child with cerebral palsy may, in addition to the CP problems have hearing and visual problems; however, not all

CP children have all of these problems; many are gifted..."

121 Cong. Rec. 23707 (1975)*

Both the House and Senate Reports referred to estimates of approximately 6 to 8 million children who would be considered handicapped under the definitions in the Act; the majority of these children, suffering from disabilities such as speech impairment, emotional disturbance and learning disabilities, were "self-sufficient" but needed special education services to receive a meaningful education.**

* Some of the types of services beyond "self-sufficiency" which higher functioning students would be expected to need were spelled out in the report of the House Committee on Education and Labor, which emphasized "physical education, exercise, and participation in sports," "artistic and cultural programs" and "extracurricular activities... such as 4-H, young business clubs, production and selling." House Report at 9-10.

** House Report at 11, Senate Report at 8. The reports discussed statistics from the Bureau of the Education for the Handicapped estimating the prevalence of each major category of handicapping condition. These breakdowns show that the incidence of mild disabilities such as speech impairment, learning disability, and emotional disturbance was substantially higher than the incidence of severe disabling categories such as multiple handicaps and severe mental retardation, to which self-sufficiency concepts would be relevant:

	Prevalence	Number of Children 5 to 17 yrs.
Visually handicapped	0.1	51,800
Deaf	.75	38,900
Hard of hearing	.5	259,000
Speech handicapped	3.5	1,813,000
Crippled and other health impaired	.5	259,000
Emotionally disturbed	2.0	1,026,000
Mentally retarded	2.3	1,185,400
Learning disabilities	3.0	1,554,000
Multiple handicapped	.06	31,000
Total	12.035	6,218,200

(House Report at 11)

Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, and a prime sponsor of the bill, presented during the Senate debates a state-by-state summary of the number of children who were receiving an "inappropriate" education at the time. "Inappropriateness" was repeatedly defined in terms of "not receiving a public education designed to meet their needs" and not receiving "a meaningful public education." These findings referred to millions of unserved and under-served children from all disability categories. 121 Cong. Rec. 19486-19492. *See also, e.g., id.* at 19502 (remarks of Sen. Cranston); *id.* at 19504 (remarks of Sen. Mondale); *id.*, (remarks of Sen. Humphrey); *id.* at 23704 (remarks of Rep. Brademas)

The definition of "handicapped" included in §1401(1)* specifically incorporates the full range of disabilities and conclusively demonstrates Congress' intent to cover the needs of all the handicapped. The "self-sufficiency standard" relates only to a small fraction of the population included in the definition under the Act; clearly it is inconsistent with the Congressional intent.

The commensurate opportunity standard adopted by the courts below is the only interpretation of the "appropriate education" requirements of the Act advanced by any court or regulatory agency** that is broad enough to supply rules of decision for disputes involving handicapping conditions across the full spectrum of disabilities and yet is delimited enough to keep the results within the bounds of fiscal prudence. Actual experience with this standard not only in this case, but also in the other recent cases cited above shows that it is judicially manageable. The standard, while requiring special education geared to the individual child's needs, also is sensitive to the fiscal realities of a particular school district (*see Mills, supra,* 348 F. Supp. at 876) and reasonably permits a range of cost differentials – from a few dollars for supplementary large-type books for the mildly visually impaired to more expensive services which are required at least temporarily, for students like Amy Rowley***.

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* "The term 'handicapped children' means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services."

** HEW regulations implementing §504 of the Rehabilitation Act of 1973, 29 USC. §794, cited below at 483 F. Supp. 533, define appropriate education as "regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." 45 C.F.R. §84.33(b)(1), recodified as 34 C.F.R. §104.33(b)(1). Regulations issued under one statute are, of course, relevant to the interpretation of another closely connected statute. Note also that in this situation, the regulations under the Handicapped Act in effect at the time of the District Court decision below explicitly required that each state's annual plan include an assurance that the program be operated in accordance with the 504 Regulations. *See* 45 C.F.R. §121a.150 (1979).

*** The average costs experienced by school boards throughout the country in implementing the appropriate education requirements of the Act (under the generally prevalent commensurate opportunity standard) appear to be well within the range anticipated by Congress at the time of the passage of the Act.

Most of the petitioners' criticism of the commensurate opportunity standard is actually a misdirected attack on the "maximum potential" standard that was already rejected by the courts below*. The petitioners' only direct criticism of the commensurate opportunity standard focuses on the alleged difficulty of measuring the "potential and shortfall from potential of the handicapped and non-handicapped children in a given population." (Pet. 70). On the facts of the present case, Judge Broderick determined, and the Court of Appeals agreed, that the record presented sufficient objective measures (achievement, I.Q., and auditory speech discrimination tests) to permit a quantitative expression of Amy's shortfall as compared with opportunities available to her peers. It may be that such quantitative measures may not be available or may be difficult to apply in other cases. But invocation of the commensurate opportunity standard need not be (and, indeed, has not been – see cases cited *supra* at 9) dependent upon the availability of specific quantitative measurements.**

The Congressional reports and debates repeatedly cited figures anticipating that the cost of educating a handicapped child, on average, would be 1.9 times the cost of educating the non-handicapped. *See, e.g.*, House Report, at 12; *see also* 121 Cong Rec. 23703 (remarks of Rep. Brademas); *id.* at 23706 (remarks of Rep. Perkins); *id.* at 37418 (remarks of Sen. Biden); *id.* at 37420 (remarks of Sen. Hathaway). The latest available figures show that in 1980, the average nationwide *per capita* supplemental cost for special education was $1900 (U.S. Dept. of Education, U.S. Office of Special Education and Rehabilitation Services, "Second Annual Report to Congress on Implementation of Public Law 94-142; The Education for All Handicapped Children Act," p. 20, Table 1.1 (1980)). This $1900 supplement, considered in relation to the average nationwide *per capita* expenditure for non-handicapped children in 1980 of $2,230 (National Center for Educational Statistics, U.S. Dept. of Education, "Statistics of Public School Systems, Fall 1980" (Early Release), p. 5) represents a cost ratio of 1.85, slightly below the ratio anticipated by the Congress.

* *See, e.g.*, Pet. 47 ("scheme of unlimited liability"); *id.* at 65, 72 ("opportunity for full potential"). *See also* Brief of *Amici Curiae*, National School Boards Association, *et al.*, 9, 24, 26.

** Although some language in the District Court decision below might be read to imply that quantitative measurement is a *sine que non* for application of the commensurate opportunity standard in all cases, such statements were clearly *dicta*, which was not necessary for the holding in this case, and was not incorporated in the Second Circuit's affirmance.

Without reference to quantitative testing measurements, the commensurate opportunity standard clearly incorporates important comparative benchmarks for judicial review. For example, the standard is directly relevant to the following specific issues which have arisen in recent years in administrative hearings and court cases in which *amici curiae* have been involved:

* *Hours of instruction.* In New York State, all non-handicapped children at the elementary school level receive a minimum of five hours of instruction per day. But some programs for handicapped children provide only three or four hours of instruction per day.

* *Delays in placement.* Non-handicapped students newly enrolling in public schools are generally placed in specific class assignments on the first day of a new term or very shortly thereafter. In many cases, however, handicapped children are not placed until months after school opens, even if all their tests and evaluations have been fully completed.

* *Curriculum standards.* Curriculum standards for self-contained special education programs sometimes are maintained on a simplified, low-functioning level, even though many children assigned to these classes are capable of absorbing the same level of curriculum materials as non-handicapped (in some cases, of course, with supplemental instructional equipment or aids).

* *Enrichment activities.* Handicapped students are often excluded from participation in basic school enrichment activities such as assembly programs, library instruction, and after-school clubs and activities.

In each of these situations, a board of education would be required, under the commensurate opportunity standard, to explain practices which deny to handicapped children specific opportunities that the district makes available to the non-handicapped. Although in come cases, proferred justifications will need to be considered (as, for example, whether an "instructional lunch" period may reasonably be substituted for classroom instruction time), the comparative perspective of commensurate opportunity

provides a concrete framework for judicial review*, a framework which clearly is lacking in self-sufficiency, or any other standard which has been proposed. Case law precedents emerging under the standard, both in the clear-cut situations like those listed above, and from more complex cases of children with unusual special needs as in *Espino, supra,* will further enable the courts, where necessary, to assure the provision of an "appropriate education," consistent with the purposes of the Act, which is tailored to the individual needs of each child.

In short, the commensurate opportunity standard adopted by the courts below is the only meaningful and effective standard for judicial review which has been presented to the Court.

CONCLUSION

For all the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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* In most situations where these issues have arisen to date, they have been settled by negotiations between the parties or at administrative hearings, primarily through application of a perhaps unstated, but usually implicit, commensurate opportunity approach. *See, e.g., Jose P* v. *Ambach* 3 E.H.L.R. 551:245, 3 E.H.L.R. 551:412 (E.D.N.Y. 1979); *United Cerebral Palsy of New York* v. *Board of Education,* 3 E.H.L.R. 551:251 (E.D.N.Y. 1979), *consolidated appeals aff'd,* F. 2d (2d Cir. January 21, 1982). It would seem, in fact, that the very clarity and ease of applicability of the commensurate opportunity standard promotes settlement and administrative resolution of these issues and tends to limit the number of cases brought to the courts under §1415(e)(2).